

Supreme Court, U.S.
FILED

05-605 NOV 14 2005

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No. 05-

IN THE
Supreme Court of the United States

JOHN MAPU, JR.,

Petitioner,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

PETITION FOR WRIT OF CERTIORARI

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November 14, 2005

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Federal Circuit erred, and created a circuit conflict, by holding that Congress implicitly precludes equitable tolling by providing one or more exceptions to a particular statutory deadline.

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INTRODUCTION

This petition presents the question whether the Federal Circuit will be allowed effectively to write the doctrine of equitable tolling out of existence. The very predicate for the application of that doctrine is that a litigant has missed a deadline; only then does the litigant need to invoke the doctrine at all. It logically follows, therefore, that a mere failure to comply with a statutory deadline cannot be a reason to preclude equitable tolling, because equitable tolling assumes such noncompliance in the first place. Here, Congress crafted an exception to a statutory deadline: while a veteran's notice of appeal generally must be *received* by the Court of Appeals for Veterans Claims on or before the due date, the notice of appeal is timely if *postmarked* by the United States Postal Service on or before the due date. 38 U.S.C. § 7266. The statute says nothing about appeals sent by Federal Express, so the "postmark" exception reasonably can be construed not to encompass such appeals. But it does not follow that equitable tolling is inapplicable to such appeals. To the contrary, Congress legislates against a background rule of equitable tolling, and the innocent mistake in this case (sending a notice of appeal by Federal Express rather than U.S. mail at the height of the 2001 anthrax crisis) provides a classic setting for application of the doctrine.

The Federal Circuit held below, however, that Congress implicitly precluded equitable tolling with respect to veterans' appeals filed by Federal Express because such appeals do not fall within the scope of the statutory "postmark" exception. But that is a *non sequitur*. Establishing that an appeal is untimely is not the same as establishing that Congress implicitly precluded equitable tolling with respect to that appeal; as noted above, equitable tolling only comes into play in the first place if a litigant has missed a deadline. The Federal Circuit's approach thus renders equitable tolling

a dead letter, by providing that the very predicate for the doctrine implicitly precludes its application.

The decision below thus conflicts with the "hornbook law that limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotations omitted). Nothing in the text (not to mention the structure or history) of the veterans' appeal statute remotely suggests that Congress intended to preclude equitable tolling with respect to untimely appeals filed by Federal Express. To the contrary, the Federal Circuit simply drew a negative inference from the fact that Congress did not include such appeals within the scope of the "postmark" exception. But the very lesson of *Young* is that such a negative inference is insufficient to establish that Congress "implicitly precluded" the background doctrine of equitable tolling. *See id.* at 49-53.

Not surprisingly, thus, every other circuit to address the issue has concluded that Congress does *not* implicitly preclude equitable tolling by simply providing one or more specific exceptions to a particular statutory deadline. *See, e.g., Neverson v. Farquharson*, 366 F.3d 32, 40-41 (1st Cir. 2004); *Chung v. Department of Justice*, 333 F.3d 273, 277 (D.C. Cir. 2003); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999). Until the decision below, indeed, it was safe to say (as did the D.C. Circuit in *Chung*) that "neither the Supreme Court nor any other court has deemed that negative implication alone sufficient to defeat the presumption" in favor of equitable tolling. *Chung*, 333 F.3d at 277.

To be sure, there is no circuit conflict on the specific question whether the veterans' appeal statute "implicitly precludes" equitable tolling with respect to appeals filed by Federal Express. But that is only because the Federal Circuit has exclusive jurisdiction over such appeals, so by definition no such specific conflict can develop. There can

be no question, however, that the Federal Circuit's reasoning conflicts with this Court's teachings on equitable tolling, and with the reasoning of other courts of appeals applying those teachings. This Court should not allow the Federal Circuit to write the doctrine of equitable tolling out of existence, especially in the context of veterans' appeals, which typically involve *pro se* filers in what is supposed to be a non-adversarial benefits scheme. Accordingly, this Court should grant this petition, and either set this case for plenary review or summarily reverse the decision below.

OPINIONS BELOW

The Federal Circuit's decision is reported at 397 F.3d 1375 and reprinted in the Appendix ("App.") at 1a-10a. The final unreported decision of the United States Court of Appeals for Veterans Claims ("CAVC") dismissing petitioner's appeal is reprinted at App. 13a-20a. The Federal Circuit's unpublished order vacating the CAVC's prior panel decision dismissing petitioner's appeal is reprinted at App. 23a-24a, and the latter unreported decision is reprinted at App. 25a-27a. The CAVC's initial unreported single-judge decision dismissing petitioner's appeal is reprinted at App. 28a-30a. The underlying Board of Veterans' Appeals' decision denying petitioner's application for service-connected benefits is reprinted at App. 33a-54a.

JURISDICTION

The Federal Circuit rendered its decision on February 15, 2005, App. 1a, and denied a timely petition for panel rehearing and rehearing en banc on June 16, 2005, App. 11a-12a. On September 7, 2005, Justice Breyer granted petitioner's application to extend the time within which to file a petition for a writ of certiorari to November 13, 2005. Because that day is a Sunday, this petition is timely filed on Monday, November 14, 2005. See S. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

38 U.S.C. § 7266 provides:

(a) In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104 (e) of this title.

(b) An appellant shall file a notice of appeal under this section by delivering or mailing the notice to the Court.

(c) A notice of appeal shall be deemed to be received by the Court as follows:

(1) On the date of receipt by the Court, if the notice is delivered.

(2) On the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed.

(d) For a notice of appeal mailed to the Court to be deemed to be received under subsection (c)(2) on a particular date, the United States Postal Service postmark on the cover in which the notice is posted must be legible. The Court shall determine the legibility of any such postmark and the Court's determination as to legibility shall be final and not subject to review by any other Court.